

# Unauthorized Alien Students: Legislation in the 107<sup>th</sup> and 108<sup>th</sup> Congresses

Updated January 17, 2007

Congressional Research Service

<https://crsreports.congress.gov>

RL31365

## Summary

Unauthorized alien students constitute a subpopulation of the total U.S. unauthorized alien population that is of particular congressional interest. These students receive free public primary and secondary education, but often find it difficult to attend college for financial reasons. A provision enacted as part of a 1996 immigration law prohibits states from granting unauthorized aliens certain postsecondary educational benefits on the basis of state residence, unless equal benefits are made available to all U.S. citizens. This prohibition is commonly understood to apply to the granting of “in-state” residency status for tuition purposes.

In addition, unauthorized aliens are not eligible for federal student financial aid. More generally, as unauthorized aliens, they are not legally allowed to work in the United States and are subject to being removed from the country at any time.

Bills were introduced in the 107<sup>th</sup> and 108<sup>th</sup> Congresses to address the educational and immigration circumstances of unauthorized alien students. Most of these bills had two key components. They would have repealed the 1996 provision. They also would have provided immigration relief to certain unauthorized alien students by enabling them to become legal permanent residents of the United States. In both Congresses, bills known as the DREAM Act (S. 1291 in the 107<sup>th</sup> Congress; S. 1545 in the 108<sup>th</sup> Congress) containing both types of provisions were reported by the Senate Judiciary Committee.

This report will not be updated.

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## Background

Recent estimates that the unauthorized (illegally present) alien population in the United States exceeds 11 million has focused renewed attention on this population.<sup>1</sup> The 107<sup>th</sup> and 108<sup>th</sup> Congresses considered legislation to address one segment of the unauthorized population—aliens who, as children, were brought to live in the United States by their parents or other adults. In a 1982 case, the Supreme Court struck down a state law that prohibited unauthorized alien children from receiving a free public education, making it difficult, if not impossible, for states to deny an elementary or secondary education to such students.”<sup>2</sup>

Unauthorized aliens who graduate from high school and want to attend college, however, face various obstacles. Among them, a provision enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>3</sup> discourages states and localities from granting unauthorized aliens certain “postsecondary education benefits.” This provision (IIRIRA §505) directs that an unauthorized alien—

shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

Although IIRIRA §505 does not refer explicitly to the granting of “in-state” residency status for tuition purposes and some question whether it even covers in-state tuition, the debate surrounding §505 has focused on the provision of in-state tuition rates to unauthorized aliens. The Higher Education Act of 1965, as amended,<sup>4</sup> also makes unauthorized alien students ineligible for federal student financial aid. In most instances, they are likewise ineligible for state financial aid. Moreover, as unauthorized aliens, they are unable to work legally and are subject to removal from the country regardless of the number of years they have lived in the United States.

## Legislation in the 107<sup>th</sup> and 108<sup>th</sup> Congresses

In the 107<sup>th</sup> and 108<sup>th</sup> Congresses, legislation was introduced—but not enacted—to provide relief to unauthorized alien students. These bills sought to repeal IIRIRA §505 and, thereby, provide unauthorized students greater access to postsecondary education. These bills also would have enabled certain unauthorized students to adjust to legal permanent resident (LPR) status. Legal permanent residents, sometimes referred to as “green card holders,” are able to live and work indefinitely in the United States. In most cases, they are able to apply for U.S. citizenship after five years. The unauthorized student bills introduced in the 107<sup>th</sup> and 108<sup>th</sup> Congresses were

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<sup>1</sup> See Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.; Estimates Based on the March 2005 Current Population Survey*, Pew Hispanic Center, Mar. 7, 2006, at <http://pewhispanic.org/reports/report.php?ReportID=61>. Also see CRS Report RS21938, *Unauthorized Aliens in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

<sup>2</sup> *Plyler v. Doe*, 457 U.S. 202 (1982). Also see CRS Report RS22500, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, by Jody Feder.

<sup>3</sup> IIRIRA is Division C of P.L. 104-208, Sept. 30, 1996.

<sup>4</sup> P.L. 89-329, Nov. 8, 1965, 20 U.S.C. §1001 *et seq.* Section 484(a)(5) sets forth immigration-related eligibility requirements for federal student financial aid, and §484(g) requires the U.S. Department of Education to verify the immigration status of applicants for federal financial aid.

- H.R. 1563, Preserving Educational Opportunities for Immigrant Children Act, introduced in the 107<sup>th</sup> Congress and reintroduced as H.R. 84 in the 108<sup>th</sup> Congress by Representative Sheila Jackson-Lee;
- H.R. 1582, Immigrant Children’s Educational Advancement and Dropout Prevention Act, introduced in the 107<sup>th</sup> Congress by Representative Luis Gutierrez;
- H.R. 1918, Student Adjustment Act, introduced in the 107<sup>th</sup> Congress and reintroduced as H.R. 1684 in the 108<sup>th</sup> Congress by Representative Chris Cannon;
- S. 1291, Development, Relief, and Education for Alien Minors Act (DREAM Act), introduced in the 107<sup>th</sup> Congress and reintroduced (in modified form) as S. 1545 in the 108<sup>th</sup> Congress by Senator Orrin Hatch;
- S. 1265, Children’s Adjustment, Relief, and Education Act (CARE Act), introduced in the 107<sup>th</sup> Congress by Senator Richard Durbin; and
- Title III, Subtitle D of S. 8, Educational Excellence for All Learners Act of 2003, introduced in the 108<sup>th</sup> Congress by then-Senate Minority Leader Thomas Daschle.<sup>5</sup>

## Activity in the 107<sup>th</sup> Congress

In the 107<sup>th</sup> Congress, the Senate Judiciary Committee reported an amended version of S. 1291, known as the DREAM Act. This amended measure represented a compromise between S. 1291, as introduced, and S. 1265. None of the other pending bills saw any action beyond committee referral. (**Appendix A** contains a table comparing four unauthorized alien student bills introduced in the 107<sup>th</sup> Congress.)

## Activity in the 108<sup>th</sup> Congress

In the 108<sup>th</sup> Congress, S. 1291, as reported by the Senate Judiciary Committee in the 107<sup>th</sup> Congress, was included as part of S. 8, an education measure introduced by then-Senate Minority Leader Daschle. In addition, a new version of the DREAM Act (S. 1545) was introduced by Senator Hatch. On November 25, 2003, the Senate Judiciary Committee reported S. 1545 with an amendment.<sup>6</sup> The other unauthorized alien student bills did not see any action beyond committee referrals.

## Overview of Bills

Four bills (H.R. 84, H.R. 1684, S. 8, and S. 1545, as reported)<sup>7</sup> would have enabled eligible unauthorized students to obtain LPR status through an immigration procedure known as *cancellation of removal*. (The major features of the bills are compared in **Appendix B**.)

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<sup>5</sup> Provisions to legalize the status of certain unauthorized alien students were also included in bills entitled the “Earned Legalization and Family Unification Act,” introduced in the 107<sup>th</sup> Congress by Rep. Richard Gephardt (H.R. 5600), and in the 108<sup>th</sup> Congress by Rep. Gephardt (H.R. 3271) and Rep. Jackson-Lee (H.R. 1830). These bills would not have repealed IIRIRA §505.

<sup>6</sup> A written report was subsequently filed. See U.S. Congress, Senate Committee on Judiciary, *Amending the Illegal Immigration Reform Act of 1996*, report to accompany S. 1545, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 108-224.

<sup>7</sup> Hereafter, in this section, “S. 1545” refers to the bill, as reported. Differences between S. 1545, as introduced, and as reported are discussed in the next section on the Senate Judiciary Committee markup of the bill.

Cancellation of removal is a discretionary form of relief authorized by the Immigration and Nationality Act (INA), as amended,<sup>8</sup> that an alien can apply for while in removal proceedings before an immigration judge. If cancellation of removal is granted, the alien's status is adjusted to that of an LPR.<sup>9</sup> H.R. 84 and H.R. 1684 would have permanently amended the INA to make unauthorized alien students who meet certain requirements eligible for cancellation of removal/adjustment of status, whereas S. 8 and S. 1545 would have established temporary cancellation of removal/adjustment of status authorities separate from the INA. H.R. 1684, S. 8, and S. 1545 would have allowed aliens to affirmatively apply for relief without being placed in removal proceedings. Other bills, H.R. 3271 and H.R. 1830,<sup>10</sup> also would have enabled eligible unauthorized alien students to obtain LPR status, but they would not have done so through a cancellation of removal mechanism. Instead, they would have established a temporary adjustment of status authority.

The INA limits the number of aliens who can be granted cancellation of removal/adjustment of status in a fiscal year to 4,000. It, however, contains exceptions for certain groups of aliens. H.R. 1684 would have amended the INA to add an exception to the numerical limitation for aliens granted cancellation of removal/adjustment of status under its terms. No numerical limit would have applied under H.R. 3271, S. 8, or S. 1545.

S. 1545 differed from the other bills in that it would have established a two-stage process by which aliens could obtain LPR status. Aliens granted cancellation of removal under the bill would have been adjusted initially to *conditional* permanent resident status. Such conditional status would have been valid for six years and would have been subject to termination. To have the condition removed and become full-fledged LPRs, the aliens would have had to submit an application during a specified period and meet additional requirements. The other bills would have adjusted all eligible aliens directly to full-fledged LPR status.

As detailed in **Appendix B**, H.R. 84, H.R. 1684, H.R. 3271, S. 8, and S. 1545 varied in their eligibility criteria. Among these criteria, all five would have required continuous physical presence in the United States for a specified number of years. In the case of S. 8 and S. 1545, the continuous presence requirement would have had to be satisfied prior to the date of enactment. Under H.R. 84, H.R. 1684, and H.R. 3271, the continuous presence requirement would have needed to be met prior to the date of application for relief. All of the bills except H.R. 84 would have limited relief to aliens meeting specified age requirements. All five bills would have required a showing of good moral character.

With respect to educational status, H.R. 1684 and H.R. 3271 would have required prospective beneficiaries to be enrolled at or above the 7<sup>th</sup> grade level, or enrolled in, or actively pursuing admission to, an institution of higher education in the United States. S. 8 would have granted LPR status only to individuals with a high school diploma or equivalent credential. Under S. 1545, in order to obtain conditional LPR status, aliens would have needed to gain admission to an institution of higher education or possess a high school diploma or equivalent credential. H.R. 84 contained no educational requirements.

## Markup of S. 1545

On October 16 and October 23, 2003, the Senate Judiciary Committee marked up S. 1545. At the October 16 session, the Committee voted in favor of an amendment in the nature of a substitute

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<sup>8</sup> Act of June 27, 1952, ch. 477; 8 U.S.C. §1101 *et seq.*

<sup>9</sup> Rules governing cancellation of removal/adjustment of status are set forth in INA §240A.

<sup>10</sup> H.R. 3271 and H.R. 1830 contained the same unauthorized alien student provisions.

proposed by Senator Hatch for himself and Senator Durbin. The substitute amended various provisions of S. 1545, as introduced. Among the substantive amendments were changes to the confidentiality of information section. For example, the bill, as introduced, stated that information furnished by applicants could not be used for any purpose other than to make a determination on the application. The substitute amended this provision to state that information furnished by applicants could not be used to initiate removal proceedings against individuals identified in the application.

At the October 23 meeting, the Judiciary Committee considered a set of amendments to S. 1545 offered by Senator Charles Grassley. Two of these amendments were the subject of debate at the markup. The first proposed to amend a provision in the bill allowing aliens who, prior to the date of enactment, met the requirements for both conditional resident status and removal of the condition, to petition for LPR status without first becoming conditional residents. The amendment would have made these aliens subject to the same period of conditional residence as other aliens eligible for relief under the bill. The second amendment proposed to place restrictions on the availability of federal student financial aid to aliens eligible for adjustment to LPR status under the bill. Under the amendment, these aliens would have been eligible only for specified student loan and work-study programs. Among the other amendments in the Grassley package was one that would have required beneficiaries of the bill to be registered in the Student and Exchange Visitor Information System (SEVIS), the monitoring system for foreign students.<sup>11</sup>

The Committee voted, 18-1, to approve the Grassley amendments, and voted, 16-3, to report the bill, as amended. The Committee acted, however, with the understanding that the bill would be subject to further discussion and modification prior to being reported. In S. 1545, as reported, the Grassley amendment language on federal financial assistance was modified, as described in the next section. The rest of the Grassley amendments were unchanged.

## **Federal Postsecondary Educational Benefits**

Under Title IV of the Higher Education Act of 1965, as amended,<sup>12</sup> LPRs and certain other eligible noncitizens may receive federal student financial aid. Pell Grants and Stafford loans authorized under Title IV comprise 85% of postsecondary student aid. S. 1545, as reported, would have placed restrictions on eligibility for higher education assistance for beneficiaries of the bill's adjustment provisions. With respect to assistance provided under Title IV, it would have made aliens who adjust to LPR status under the bill eligible only for student loans, federal work-study programs, and services (such as counseling, tutorial services, and mentoring), subject to the applicable requirements. Thus, aliens adjusting status under S. 1545 would not have been eligible for Pell Grants. H.R. 84, H.R. 1684, H.R. 3271, and S. 8, as introduced, did not contain restrictions on eligibility for federal student financial aid. An alien who adjusted to LPR status under any of these bills would have been eligible, as an LPR, for federal financial aid under Title IV. H.R. 84 and H.R. 1684 additionally would have extended this eligibility to unauthorized students who had applied for, but not yet been granted, cancellation of removal/adjustment of status.

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<sup>11</sup> For information on SEVIS, see CRS Report RL32188, *Monitoring Foreign Students in the United States: The Student and Exchange Visitor Information System (SEVIS)*, by Alison Siskin.

<sup>12</sup> P.L. 89-329, Nov. 8, 1965, 20 U.S.C. §1001 *et seq.*

# Appendix A. Comparison of Major Provisions of Bills in the 107<sup>th</sup> Congress on Unauthorized Alien Students

Current Law	H.R. 1563, as introduced	H.R. 1582, as introduced	H.R. 1918, as introduced	S. 1291, as reported
<b>Postsecondary education benefits based on state residence</b>				
Unauthorized aliens are ineligible for such benefits unless equal benefits are made available to all U.S. citizens, regardless of state of residence. IIRIRA §505.	Would have repealed IIRIRA §505.	Similar provision to H.R. 1563.	Similar provision to H.R. 1563.	Similar provision to H.R. 1563.
<b>Eligibility requirements for COR/AOS of aliens brought into the United States as minors</b>				
No provision. [INA §240A is the Act's COR/AOS section.]	Would have amended INA. <i>For aliens under 18:</i> Would have required continuous physical presence in U.S. for three years preceding application; good moral character; and determination that removal would cause extreme hardship to alien, alien's child, or alien's parent.	Would have amended INA. <i>For aliens under 21:</i> Would have required continuous physical presence in U.S. for five years preceding application; good moral character; and enrollment in secondary school or attendance/pursuit of admission to institution of higher education.	Would have amended INA. <i>For aliens under 21:</i> Similar requirements to H.R. 1582.	Would have created a new COR/AOS authority. <i>For aliens under 21:</i> Would have required continuous physical presence in U.S. for five years preceding enactment; good moral character; and graduation from secondary school or equivalent.
	<i>For aliens age 18 or older:</i> Same, except would have required continuous physical presence in U.S. for five years preceding application, including three years before age 18.	<i>For aliens age 21-24:</i> Same, except would have required continuous physical presence in U.S. for five years preceding application, including five years before age 21.	<i>For aliens age 21 or older:</i> Would have required that application be filed within 120 days of effective date of regulations; that alien have met requirements for aliens under 21 based on application filed anytime in the four years prior to enactment; and that alien be enrolled in or have graduated from institution of higher education.	<i>For aliens age 21 or older:</i> Would have required that alien have met requirements for aliens under 21 at anytime in the four years prior to enactment; and that alien be enrolled in or have graduated from institution of higher education.



Current Law	H.R. 1563, as introduced	H.R. 1582, as introduced	H.R. 1918, as introduced	S. 1291, as reported
<b>Special provisions for aliens potentially eligible for COR/AOS</b>				
No provision.	No provision.	No provision.	No provision.	Would have granted work authorization and protection from removal to otherwise eligible aliens who had not yet met requirement of secondary school graduation.
<b>Adjustment of status of minor children of alien</b>				
No provision.	No provision.	Would have provided for adjustment of status of minor children of aliens granted COR/AOS.	No provision.	No provision.
<b>Application for relief</b>				
No provision.	No provision.	Alien could have applied affirmatively for relief without being placed in removal proceedings.	Similar provision to H.R. 1582.	Similar provision to H.R. 1582.
<b>Numerical limit on COR/AOS</b>				
There is an annual limit of 4,000 on the number of aliens who can be granted COR/AOS. INA §240A(e)(1).	Current law.	Would have amended INA to exempt aliens granted COR/AOS under the bill from the limit.	Similar provision to H.R. 1582.	No numerical limit would have applied.
<b>Federal postsecondary education benefits</b>				
Aliens who are not “qualified aliens” are ineligible for most federal public benefits, including postsecondary education benefits. P.L. 104-193, §401. Unauthorized aliens are not qualified aliens. P.L. 104-193, §431(b).	Would have amended definition of qualified alien to include alien granted COR/AOS under the bill or alien with a pending application for COR/AOS.	Would have considered alien with pending application for COR/AOS under the bill to be qualified alien for purposes of receiving postsecondary education benefits.	Similar provision to H.R. 1563.	Current law.

## Appendix B. Comparison of Major Provisions of Bills in the 108<sup>th</sup> Congress on Unauthorized Alien Students

Current Law	H.R. 84, as introduced	H.R. 1684, as introduced	H.R. 3271, as introduced	S. 8 (Title III, Subtitle D), as introduced	S. 1545, as reported
<b>Postsecondary education benefits based on state residence</b>					
Unauthorized aliens are ineligible for such benefits unless equal benefits are made available to all U.S. citizens, regardless of state of residence. IIRIRA §505.	Would have repealed IIRIRA §505.	Similar provision to H.R. 84.	Current law.	Similar provision to H.R. 84.	Similar provision to H.R. 84.
<b>Eligibility requirements for adjustment of status (AOS) of aliens brought into the United States as minors</b>					
No provision. [INA §240A is the Act's cancellation of removal(COR)/AOS section.]	Would have amended INA §240A. <i>For aliens under 18:</i> Would have required continuous physical presence in U.S. for three years preceding application; good moral character; determination that removal would result in extreme hardship to alien, alien's child, or alien's parent; and alien not inadmissible or deportable on applicable grounds. <i>For aliens age 18 or older:</i> Same, except would have required continuous physical presence in U.S. for five years preceding application, including three years before age 18.	Would have amended INA §240A. <i>For aliens under 21:</i> Would have required physical presence in U.S. on date of enactment; continuous physical presence for five years preceding application; good moral character; enrollment at or above 7 <sup>th</sup> grade level or enrollment in/pursuit of admission to institution of higher education (IHE); and alien not inadmissible or deportable on applicable grounds. <i>For aliens age 21 or older:</i> Would have required filing of application during specified period; that alien would have met requirements for aliens under 21 based on	Would have created a new AOS authority. Would have required filing of application during specified period; alien under age 25 on application date; presence in U.S. on date of enactment; continuous presence in U.S. for five years preceding application; good moral character; enrollment at or above 7 <sup>th</sup> grade level or enrollment in/pursuit of admission to institution of higher education; and alien not inadmissible or deportable on applicable grounds.	Would have created a new COR/AOS authority. <i>For aliens under 21:</i> Would have required attainment of age 12 by enactment; continuous physical presence in U.S. for five years preceding enactment; good moral character; high school diploma or equivalent; and alien not inadmissible or deportable on applicable grounds. <i>For aliens age 21 or older:</i> Would have required that alien would have met requirements for aliens under 21 at anytime in the four years prior to enactment; and that alien be enrolled in, or have graduated from, IHE.	Would have created a new COR/AOS authority. <i>For COR/conditional permanent resident status:</i> Would have required alien under age 16 at initial entry; continuous physical presence in U.S. for five years preceding enactment; good moral character; admission to institution of higher education, or high school diploma or equivalent; alien not inadmissible or deportable on applicable grounds; and alien never under final order of exclusion, deportation, or removal.

Current Law	H.R. 84, as introduced	H.R. 1684, as introduced	H.R. 3271, as introduced	S. 8 (Title III, Subtitle D), as introduced	S. 1545, as reported
		application filed anytime in the four years prior to enactment; and that alien be enrolled in, or have graduated from, IHE.			
<b>Requirements for removal of condition on LPR status</b>					
No provision.	No provision.	No provision.	No provision.	No provision.	Would have required filing of petition during specified period; good moral character; alien not inadmissible or deportable on applicable grounds; no abandonment of U.S. residence; names of all U.S. secondary schools attended; and one of the following: (1) degree from IHE or completion of two years in good standing in bachelor's (or higher) degree program; or (2) two years of service in U.S. Armed Forces.

Current Law	H.R. 84, as introduced	H.R. 1684, as introduced	H.R. 3271, as introduced	S. 8 (Title III, Subtitle D), as introduced	S. 1545, as reported
<b>Grounds for termination of conditional LPR status</b>					
No provision.	No provision.	No provision.	No provision.	No provision.	Would have terminated status if alien was not of good moral character; was inadmissible or deportable on applicable grounds; had become a public charge; had received an other-than honorable discharge from the U.S. Armed Forces; or if Secretary of Homeland Security determined information in petition to remove condition was not true.
<b>Special provisions for aliens potentially eligible for relief</b>					
No provision.	No provision.	No provision.	Would have granted protection from removal and work authorization to aliens with prima facie case of eligibility.	Would have granted protection from removal and work authorization to otherwise eligible aliens who had not yet met high school graduation requirement.	Would have granted protection from removal and work authorization to otherwise eligible aliens who had not yet met high school graduation requirement; were at least age 12; and were enrolled full-time in primary or secondary school.
<b>Application for relief</b>					
No provision.	No provision.	Alien could have applied affirmatively for relief without being placed in removal proceedings.	No provision.	Similar provision to H.R. 1684.	Similar provision to H.R. 1684.

Current Law	H.R. 84, as introduced	H.R. 1684, as introduced	H.R. 3271, as introduced	S. 8 (Title III, Subtitle D), as introduced	S. 1545, as reported
<b>Numerical limits</b>					
There is an annual limit of 4,000 on the number of aliens who can be granted COR/AOS. INA §240A(e)(1). There are annual limits on the number of aliens who can acquire LPR status. INA §201, §202.	Current law.	Would have amended INA to exempt aliens granted COR/AOS under bill from INA numerical limit on COR/AOS.	Would have exempted aliens adjusted to LPR status under bill from INA numerical limits.	Would not have counted aliens granted COR/AOS under bill against INA numerical limit on COR/AOS.	Similar provision to S. 8.
<b>Federal postsecondary education benefits</b>					
Aliens who are not “qualified aliens” are ineligible for most federal public benefits, including postsecondary education benefits. P.L. 104-193, §401. Unauthorized aliens are not qualified aliens. P.L. 104-193, §431(b).	Would have amended definition of qualified alien to include alien granted COR/AOS under the bill or alien with a pending application for COR/AOS.	Similar provision to H.R. 84.	Current law.	Current law.	With respect to assistance under Title IV of Higher Education Act, would have made aliens who adjusted status under bill eligible only for student loans, work-study programs, and services.

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